

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to  
Implement the Commission's  
Procurement Incentive Framework and  
to Examine the Integration of  
Greenhouse Gas Emissions Standards  
into Procurement Policies.

Rulemaking 06-04-009  
(Filed April 13, 2006)

**OPENING BRIEF OF THE  
DIVISION OF RATEPAYER ADVOCATES ON  
JURISDICTIONAL ISSUES**

**I. INTRODUCTION**

The Commission opened the current rulemaking to consider adoption and implementation of a Greenhouse Gas (GHG) emissions performance standard, following the Commission's issuance of a GHG Policy Statement in October 6, 2005. The Commission hosted a three day workshop earlier this month that allowed interested stakeholders, including investor owned utilities (IOUs), electric service providers (ESPs), and representatives of consumer groups to consider policy and technical issues related to implementation of an emissions performance standard (EPS). The June 1, 2006 Assigned Commissioner's Ruling: Phase 1 Scoping Memo and Notice of Workshop on a Greenhouse Gas Performance Standard invited parties to submit briefs on jurisdictional and other issues, while cautioning parties not to reargue issues already decided.

The design parameters of the EPS are still under consideration, but the Division of Ratepayer Advocates (DRA) believes that an EPS can serve the interests of ratepayers by discouraging investment in new, high GHG-emitting plants that will result in future high costs of compliance. An EPS should apply all load serving entities (LSEs) subject

to the Commission's resource adequacy and renewable portfolio standard requirements. Such an approach would be consistent with the Commission's intent, announced in Decision (D.) 06-02-032, to apply a load-based cap on GHG emissions to all LSEs. Pending legislation,<sup>1</sup> if approved, may further reinforce the Commission's authority to impose an EPS on LSEs other than IOUs, but the Commission should not wait until the fate of that legislation is certain before moving forward with implementation of an EPS.

## II. DISCUSSION

### A. **The Commission correctly concluded that it has jurisdiction to apply a load-based cap to the GHG emissions of LSE's subject to resource adequacy and the renewable portfolio standard requirements.**

The Commission decided as a matter of policy in D.06-02-032 to move forward with establishing a load-based cap on the GHG emissions of IOUs and other LSEs that serve customers within the service territories of the IOUs. Such a cap would not differentiate between in-state and out-of-state resources used to serve LSE customers. Decision 06-02-032 therefore concluded that a load-based a cap would not violate the Interstate Commerce Clause.<sup>2</sup> The Decision also rejected expansive assertions that a load-based cap would violate federal foreign policy or "a purported national, unified regulatory policy for GHG emissions."<sup>3</sup> Instead, the Decision adopted a load-based cap as a mechanism consistent with the California's Energy Action Plan's goal of minimizing the energy sector's impact on climate change.

D.06-02-032 held that the load-based GHG emissions cap should apply to electric service providers and Community Choice Aggregators (CCAs) as well as IOUs, pursuant to Section 380(e) of the Public Utilities Code, which requires the Commission to:

"implement and enforce the resource adequacy requirements established in accordance with this section in a

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<sup>1</sup> SB 1368.

<sup>2</sup> D.06-02-032, mimeo, p. 23.

<sup>3</sup> Id., p. 24.

nondiscriminatory manner. Each load-serving entity shall be subject to the same requirements for resource adequacy and the renewable portfolio standard program that are applicable to electrical corporations pursuant to this section, or otherwise required by law, or by order or decision of the commission. The commission shall exercise its enforcement powers to ensure compliance by all load-serving entities.”

Because a load-based cap may impact an LSE’s procurement planning, applying such load-based cap to ESPs and CCAs in addition to IOUs ensures that all LSEs are subject to the same resource adequacy and renewable portfolio standard requirements.<sup>4</sup>

**B. A well designed EPS would promote similar policy goals as the load-based cap.**

Phase 1 of this proceeding addresses whether to implement an EPS in the near term, while Phase 2 will consider the myriad of complex issues required to first establish a baseline of GHG emissions for various LSEs, and then implement a load-based cap. The purposes of an emissions performance standard would be to prevent backsliding, or degradation of the emissions profiles of load serving entities and to send a clear, upfront economic signal that would encourage investment in plants that meet the EPS, while conversely discouraging investment in plants that do not. At the same time, an EPS should be simple to implement, but should not be excessively burdensome to the LSEs or endanger system reliability.

The design parameters of an EPS that would best accomplish these goals will continue to be the subject of comments and discussion over the summer, but any proposed EPS appears likely to apply on a prospective basis to new contracts and generation that exceed a certain size and length of time. There is growing support for the notion that early action to control GHG emissions is in the long term economic interest of the state. Earlier this week, 43 economists from a number of California colleges and universities urged the Governor to act now to reduce GHG emissions, pointing out that:

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<sup>4</sup> D.06-02-032, p. 25.

“Action to reduce emissions will lower the costs of adjusting to climate-related disruptions and serve as public insurance against more dramatic damages that can be expected when opportunities to adapt are limited.”<sup>5</sup>

An EPS that encourages investment in lower ghg emitting resources will serve the interests of California ratepayers by lessening the risk that LSEs will enter long term commitments that will increase future compliance costs.

**C. The Commission’s authority includes the ability to apply a nondiscriminatory EPS to the procurement of LSEs including IOUs, ESPs and CCAs.**

Assuming that the Commission adopts an emissions performance standard that applies without regard to whether generation is in state or outside the state, then the emissions performance standard would be consistent with the Interstate Commerce Clause for the same reasons discussed in D.06-02-032. If the Commission adopts an EPS that applies to contracts and resources over a certain size and length, then that emissions performance standard should apply to those contracts and resources regardless of whether they are held by an IOU or other LSE. As the Commission correctly concluded in the context of deciding to move forward with a load-based cap:

“[L]imiting GHG emissions from LSEs (including CCAs and ESPs) as part of our regulatory framework for procurement is a logical extension of this authority, in order to ensure that all LSEs are subject to the same requirements for resource adequacy and RPS, as required by Section 380(e).<sup>6</sup>

If the Commission adopts an emissions performance standard that applies to contracts or generation of five years or longer, it is not clear as a practical matter that such a standard would impact CCAs and ESPs. Currently, there are no CCAs, and if the EPS is adopted as an interim bridge until the adoption of a load-based cap, CCA compliance may not be an issue. Because ESPs have unpredictable load and are

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<sup>5</sup> June 26, 2006 letter to Governor Schwarzenegger from 43 California economists, available at [http://www.berkeley.edu/news/media/releases/2006/06/26\\_hanemannmemo.shtml](http://www.berkeley.edu/news/media/releases/2006/06/26_hanemannmemo.shtml)

<sup>6</sup> D.06-02-032, mimeo, p. 25.

precluded from signing new customers, it is unclear that they would enter into contracts for new resources of a length that would be subject to an emissions performance standard. Nevertheless, compliance with an emissions performance standard should apply to procurement regardless of the type of LSE.

### **III. CONCLUSION**

For the foregoing reasons, DRA respectfully requests that the Commission adopt its recommendations.

Respectfully submitted,

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I hereby certify that I have this day served a copy of **OPENING BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES ON JURISDICTIONAL ISSUES** in Rulemaking 06-04-009 by using the following service:

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Executed on June 30, 2006 at San Francisco, California.

/s/     NANCY SALYER

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NANCY SALYER

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